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738-993—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 212

NORMAN NATHAN SEMLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; R. 32)[1] is reported at 332 F. 2d 6.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1964, and a petition for rehearing was denied on April 28, 1964. By order of Mr. Justice Douglas, the time for filing the petition for a writ of

[1] The record lodged with the Clerk consists of 9 volumes. "R." refers to volume 1, which contains the proceedings in the court of appeals and miscellaneous documents connected with the trial proceedings. "Tr." refers to volumes 2 through 9, which contain the transcript of the trial.

certiorari was extended to and including June 27, 1964. The petition for a writ of certiorari was filed on June 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court committed plain error by giving cautionary instructions concerning the jury's consideration of the declaration of an alleged co-conspirator at the time such evidence was admitted as well as in the final charge to the jury.

STATEMENT

A ten-count indictment returned in the United States District Court for the District of Arizona charged that from May 20, 1961, to June 24, 1962, petitioner and others conspired, in violation of 18 U.S.C. 371, to steal and receive electronic equipment owned by the United States Air Force, in violation of 18 U.S.C. 641 (Count 1), and that on three occasions in March and May 1962 petitioner and one Edsel Howell received electronic equipment, knowing it to have been stolen from the United States Air Force, in violation of 18 U.S.C. 641 (Counts 5, 7, and 10). Petitioner was convicted by a jury on each of the four counts.[2] He was fined $5,000 on Count 1 and $10,000 on Count 5, and was sentenced to imprisonment for two and one-half years on Count 7 (R. 22). Imposition of sentence on Count 10 was

[2] Of the twenty other co-conspirators named in the indictment, the eight who were not named as co-defendants had pleaded guilty to substantive offenses. The case was dismissed as to one of the remaining twelve, five pleaded guilty to the conspiracy, and six were tried and convicted with petitioner.

suspended for five years and petitioner was placed on probation (R. 22). The court of appeals unanimously affirmed the convictions (Pet. App. A).

The evidence disclosed that petitioner was the owner of Semler Industries, Inc., a California company engaged in the selling of surplus materials purchased from military bases throughout the country (Tr. 2033–2034, 2039). Petitioner personally conducted the buying for the company (Tr. 2038–2039). In 1961 and 1962 petitioner made several purchases of radio equipment and sextants from one Edsel Howell (Tr. 1257–1258, 1261–1262, 1266–1269, 1271–1272, 1279–1292), an Air Force sergeant stationed at Davis-Monthan Air Force Base in Tucson, Arizona (Tr. 1248), with whom petitioner had had business dealings a few years earlier (Tr. 2040–2044, 2051–2055, 2075, 2212, 2220–2222). The evidence is undisputed that during 1961 and 1962 Howell was the leader of a conspiracy involving numerous persons at Davis-Monthan Air Force Base, that the conspirators stole electronic equipment from storage sites and airplanes and delivered it to Howell, and that it was this equipment that Howell sold to petitioner. Petitioner acknowledged the purchases from Howell, but testified that he did not then know that the items were being stolen (Tr. 2195–2196). Howell testified that in telephone conversations in which the code words "suitcases" and "eyeglasses" were used for "radios" and "sextants" (Tr. 1272–1273), petitioner told him what sort of equipment he could use (Tr. 1270, 1273–1274); that in one instance petitioner told Howell he wanted a certain number of specified instruments

which petitioner accurately described as located in a particular storage bin on the base, but petitioner cautioned Howell not to take too great a risk (Tr. 1275, 1408, 1431–1432); that several deliveries were made to petitioner in parking lots, and, at petitioner's request, in the desert (Tr. 1275–1276, 1279–1280, 1285–1286, 1288); and that in certain of their conversations indirect and direct reference was made to the fact that the equipment was stolen (Tr. 1298–1299, 1408, 1421–1422, 1432). Petitioner paid Howell for the equipment after each delivery; Howell retained approximately one-third of the proceeds, and two-thirds was distributed among the others involved in the thefts (Tr. 1269–1270, 1282, 1353, 1427).[3]

The trial of petitioner and six co-defendants lasted 17 days.[4] On the morning of the second day a government attorney asked a witness to relate the substance of a conversation with one of the co-defendants (Tr. 132–133). The attorney for petitioner objected on the grounds that "it is irrevelant and immaterial, no foundation, and calls for hearsay" (Tr. 133). In response to an inquiry by the court, the government attorney stated that the matter was being offered against all defendants on the conspiracy count (Tr. 133). The court thereupon gave the jury a caution-

[3] On cross-examination, Howell was permitted to invoke his Fifth Amendment privilege and refuse to testify concerning sales of stolen property to persons other than petitioner, a matter not gone into on direct examination (Tr. 1386–1388, 1410–1413).

[4] Over a month before trial petitioner moved for a severence (R. 9). The motion was denied (R. 10), and was not thereafter renewed.

ary instruction to the effect that, on the substantive counts, the statement could be considered only against the declarant, and that on the conspiracy count the statement could be considered against the co-defendants only if a conspiracy between the declarant and the co-defendants were shown to have existed beyond a reasonable doubt, and only if the statement were knowingly made during the pendency of the conspiracy and in furtherance of the conspiracy (Tr. 133–137). No objection either to the giving of the instruction or to its substance was made by any of the attorneys for the defendants.

A few minutes later, another statement of the same declarant was offered against all defendants on the conspiracy count (Tr. 141–142), and the court reminded the jury that the scope of its consideration of the matter would be controlled by the limiting instruction previously given (Tr. 142). In proceedings outside the hearing of the jury, petitioner's counsel objected to the admission of the statement on the same basis previously urged (Tr. 142). While he said that "The instructions which the Court just read to the jury were proper" since it would "guide their approach to the evidence as it is given during the course of the trial" (Tr. 142), he objected that the evidence should not be admitted at that time as the government had not yet made a prima facie showing of a conspiracy (Tr. 142–143). The objection was overruled (Tr. 144).

At subsequent points during the trial the jury was again reminded of the limited situation in which declarations of the individual defendants could be

considered against the others (Tr. 173, 640, 912, 1145–1146, 1149–1150, 1156, 1159–1160, 1606, 1607). In several of these instances the proffered evidence was plainly admissible against petitioner individually, and his counsel announced that he had no objection to its introduction (Tr. 1145, 1148, 1159, 1606). In the charge to the jury after final arguments of counsel the court reiterated the conditional consideration to be given the declarations and acts of co-conspirators (Tr. 2569–2571, 2592). In doing so the court read verbatim petitioner's requested instructions on the point (Tr. 2569–2571, 2592; R. 15(2), 15(7)).

ARGUMENT

Petitioner's contention that the trial court committed plain error in giving cautionary instructions at the time evidence of the conspiracy was admitted, in addition to such an instruction in the final charge, is without merit. The propriety of the charge per se is not attacked; indeed petitioner's trial attorney characterized it as proper (Tr. 142), and its import was identical to that of the final instructions requested by petitioner. Petitioner apparently argues only that a jury should not be informed of the limited consideration it might give evidence of conspiracy until moments before deliberation on the verdict.

First, petitioner did not object to the timing of the instructions at the trial even though the judge repeated the caution each time evidence of declarations was introduced. Rather, while objecting to the admission of some of the evidence on the

ground that the conspiracy had not been proved, petitioner's counsel agreed that the instructions were proper to guide the jury's "approach to the evidence as it is given during the course of the trial" (Tr. 142). At the very least, even if the timing of the instructions were erroneous, it is not the kind of plain error or defect affecting substantial rights which may be noticed under Rule 52(b) of the Federal Rules of Criminal Procedure even though not brought to the attention of the trial court.

Second, it is clear that the trial court's action was entirely proper. It is usual for trial judges to give cautionary instructions at the time evidence is introduced. This is done because, if consideration of evidence is to be limited effectively in a lengthy trial of several defendants, the limitation should be announced at the time the evidence is admitted. As noted by the court below: "Not only was it entirely proper to instruct the jury periodically in this fashion, it might well have been prejudicial error not to do so" (R. 32(3)). See *Lutwak* v. *United States*, 344 U.S. 604, 618.

The cases cited by petitioner are inapposite. In *Babson* v. *United States*, 330 F. 2d 662 (C.A. 9), contrary to the provisions of Rule 30, F.R. Crim. P., the court gave its entire charge before final arguments of counsel.[5] Here the court, at the time government evidence was admitted, simply cautioned the jury of the limited application to be given that particular

[5] Such a procedure was found to be error, but not reversible error.

evidence, and subsequently at the proper time gave its complete charge, including a reiteration of the instruction in language requested by petitioner. In *United States* v. *Allegretti*, C.A. 7, decided April 22, 1964, the court instructed the jury that previously admitted evidence might be considered against all co-defendants, using language conveying the impression that the court believed a conspiracy to have been shown. In the present case, the instructions* made no such suggestion.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1964.

* The other questions, which are raised by petitioner but not argued in his petition, were decided adversely to him by the court below and do not warrant further review.